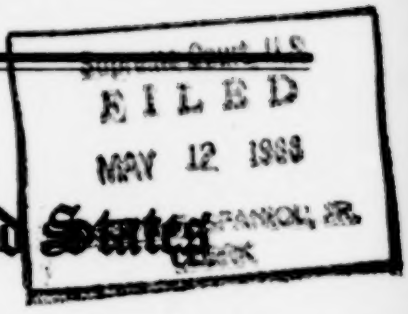
No. 87-5259



IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRANK DEAN TEAGUE,

Petitioner,

v.

MICHAEL LANE, Director,
Department of Corrections, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions, Rule, and Statute

Books and Articles

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized in 1963, at the request of the President of the United States, to involve private attorneys in the national effort to assure the civil rights of all Americans.

During the past 25 years, the Lawyers' Committee and its local affiliates have enlisted the services of thousands of members of the private bar to address the legal problems of minorities and the poor. The Committee's membership includes former presidents of the American Bar Association, a number of law school deans, and many of the nation's leading lawyers. The importance to our criminal justice system of having criminal verdicts rendered by juries untainted by discrimination, and the widespread perception that prosecutors have practiced discrimination in the exercise of peremptory challenges, prompted the Lawyers' Committee to file briefs *amicus curiae* in *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Griffith v. Kentucky*, 107 S. Ct. 708 (1987). Similar concerns for the integrity of our criminal justice system have prompted the Lawyers' Committee to file a brief *amicus curiae* in this case. The parties have consented to the filing of this brief, which is therefore submitted pursuant to Supreme Court Rule 36.2.

STATEMENT

Petitioner Frank Dean Teague, a black man, was convicted of armed robbery and attempted murder by an all-white Illinois state jury (J.A. 15). He was sentenced to two concurrent terms of 30 years' imprisonment. *People v. Teague*, 108 Ill. App. 3d 891, 893, 439 N.E.2d 1066, 1068 (1st Dist. 1982), *cert. denied*, 464 U.S. 867 (1983).

Although the venire in petitioner's case included 11 black veniremen, the State peremptorily struck 10 of them, using each and every one of the 10 peremptory

challenges then allowed by Illinois law. *See* Ill. Rev. Stat. ch. 38, ¶ 115-4(e) (1985).[1] When petitioner objected to this discrimination, the prosecutor volunteered a series of purportedly neutral explanations for excusing the 10 black veniremen (J.A. 3-4). The trial court overruled petitioner's objections, but made no finding as to the validity of the prosecutor's "explanations" (J.A. 4).

On appeal, the Illinois Appellate Court indicated that the prosecutor's "explanations" were dubious, but affirmed the conviction on the ground (Pet. App. A, at 2) that petitioner had not shown the systematic exclusion in case after case required by *Swain v. Alabama*, 380 U.S. 202 (1965). Following the denial of a petition for rehearing, the Illinois Supreme Court denied leave to appeal (J.A. 15), and, in October 1983, this Court denied certiorari (J.A. 15).

In March 1984, petitioner filed a habeas corpus petition in the United States District Court for the Northern District of Illinois. Petitioner claimed that the State had violated his Sixth Amendment right to be tried by a jury chosen from a fair cross-section of the community, and his Fourteenth Amendment right to the equal protection of the laws. The district court granted summary judgment in favor of the State, holding that petitioner's claims were foreclosed by *Swain* and Seventh Circuit case law (J.A. 5-6).

On appeal, a divided panel of the Seventh Circuit held that petitioner had established a *prima facie* violation of the Sixth Amendment fair cross-section requirement and

[1] The eleventh black venireman, the wife of a police officer, was struck by petitioner, who was accused of the attempted murder of police officers (Pet. 2-3).

remanded the case for a hearing (Pet. App. A, at 24-30).[2] The State filed a petition for rehearing *en banc*, which was granted in December 1985 (J.A. 7-8). Subsequently, while petitioner's case was pending before the *en banc* court, this Court announced its decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). By divided vote, however, the *en banc* court reversed the panel decision and affirmed the decision of the district court (J.A. 36). First, the *en banc* court held, as a matter of law, that the State's discriminatory exercise of its peremptory challenges did not violate the Sixth Amendment fair cross-section requirement (J.A. 34-36). Second, the court held that this Court's decision in *Batson* did not apply to petitioner's Fourteenth Amendment claim, which was therefore controlled by *Swain* (J.A. 16 & n.4). Finally, the court held that petitioner was not entitled to relief on his equal protection claim because, even assuming that the claim was not procedurally barred, petitioner had not established systematic exclusion in case after case, as required by *Swain* (J.A. 17 n.6).

On March 7, 1988, this Court granted certiorari (J.A. 54).

[2] The Seventh Circuit panel ordered a remand because of the "relative novelty" of its holding, but noted that, "on the present facts, a remand would be unnecessary and perhaps undesirable in allowing the state to conjure up a rationale having little to do with the reality at trial if all parties at trial had prior notice of [the] holding" (Pet. App. A, at 27-28).

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than a century, beginning with its decision in *Strauder v. West Virginia*, 100 U.S. 303 (1880), this Court has consistently condemned discrimination in jury selection procedures because a criminal defendant has a constitutional "right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria." *Batson*, 476 U.S. at 85-86. *See also Martin v. Texas*, 200 U.S. 316, 321 (1906) (Fourteenth Amendment); *Ex parte Virginia*, 100 U.S. 339, 345 (1880) (same); *Duren v. Missouri*, 439 U.S. 357, 363-64 (1979) (Sixth Amendment); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (same).

In *Swain v. Alabama*, the Court reaffirmed this longstanding principle, but sought at the same time to afford special protection to the State's peremptory challenge privilege by creating a presumption that the State's use of peremptory challenges be deemed proper in any individual case. *Swain*, 380 U.S. at 221-22. Lower courts subsequently interpreted *Swain* as holding that discrimination could be established in this context only by proving its existence in case after case, and thus precluded the granting of relief in any particular case (absent such statistical evidence), even if the State's challenges in the particular case could not be explained except as invidious discrimination. *See Batson*, 476 U.S. at 92.

In *Batson*, this Court acknowledged the "crippling burden of proof" which *Swain* and its progeny had imposed on defendants, and concluded that each defendant must be allowed to prove discrimination on the facts of his own case. *Id.* at 92-98. The Court therefore fundamentally altered the balance which *Swain* had struck between the

peremptory challenge privilege and the constitutional right to be free from invidious discrimination, and confirmed the primacy of the latter.

In the case at bar, the Seventh Circuit improperly declined to give effect to *Batson* and the long line of cases upon which its rationale is based. Indeed, the Seventh Circuit expressly based its decision (J.A. 31-34) upon its view of the peremptory challenge as a sacrosanct privilege which need not give way to constitutional requirements. Reversal is required for three separate reasons.

First, the State's deployment of its peremptory challenges violated the Sixth Amendment. Under the Sixth Amendment, as this Court held in *Taylor*, 419 U.S. at 527, a criminal defendant is entitled to be tried by a jury drawn from a fair cross-section of the community. While the fair cross-section principle does not require that any particular petit jury actually include members of any particular group, it does ensure the "fair possibility" that the jury will be comprised of various distinct community groups, and thus prohibits the State from affirmatively acting to subvert that possibility. Because the prosecutor's use of peremptory challenges effectively eliminated any possibility that blacks could sit on the petit jury in this case, petitioner established a *prima facie* violation of the Sixth Amendment.

Second, the facts of this case established a *prima facie* equal protection violation. Contrary to the Seventh Circuit's decision, petitioner was not required by *Swain v. Alabama* to prove discrimination by showing exclusion in case after case: (1) The Court's decision in *Batson* is controlling here, rather than *Swain*, because a central purpose of *Batson* was to eliminate racial discrimination from the criminal justice system, a goal which is central to our "concept of ordered liberty" and thus requires retroactive treatment; (2) *Batson*, rather than *Swain*, must be

applied to this case for the additional reason that *Batson* protects and enhances the truth-seeking goal of the criminal justice system; and (3) Regardless of whether retroactive application of *Batson* would otherwise be required, such application is required in the extraordinary circumstances of this case because the courts below perfunctorily applied the *Swain* presumption after a majority of this Court had indicated in *McCray v. New York*, 461 U.S. 961 (1983), that *Swain* should not be blindly followed.

Third, even if the *Swain* decision controls petitioner's equal protection claim, it was error for the trial court to rely on the *Swain* presumption when the prosecutor expressly invited the court to adjudge the validity of his volunteered "explanations."

ARGUMENT

I.

THE STATE'S USE OF ALL ITS PEREMPTORY CHALLENGES TO EXCLUDE 10 BLACK VENIREMEN VIOLATED THE SIXTH AMENDMENT.

A. The Sixth Amendment Fair Cross-Section Requirement Guarantees The "Fair Possibility" That The Petit Jury Will Reflect A Fair Cross-Section Of The Community.

The Sixth Amendment guarantees to each criminal defendant the right to trial by an impartial jury of his peers. U.S. Const. amend. VI.[3] That right necessarily "con-

[3] It is indeed significant that *Swain*, a Fourteenth Amendment equal protection case, was decided in 1965, three years before this Court held that the Sixth Amendment was applicable to the states. *See Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). Thus, there was no reason in *Swain* for this Court to test its holding in that case against the requirements of the Sixth Amendment.

templates a jury drawn from a fair cross section of the community." *Taylor*, 419 U.S. at 527. *See also Williams v. Florida*, 399 U.S. 78, 100 (1970). In *Taylor v. Louisiana*, this Court recognized that the "fair-cross-section requirement [not only is] fundamental to the jury trial guaranteed by the Sixth Amendment," but is mandated by the central purpose of the jury system, which is "to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over conditioned or biased response of a judge." *Taylor*, 419 U.S. at 530. *See also Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968).

This Court, of course, has never construed the fair cross-section principle to require that any particular petit jury include members of any particular group. Nonetheless, the Court repeatedly has emphasized that the Sixth Amendment prohibits the State from acting affirmatively to defeat the "fair possibility" that the petit jury will reflect a fair cross-section of the community. *Ballew v. Georgia*, 435 U.S. 223, 239 (1978); *Taylor*, 419 U.S. at 528. *See also Peters v. Kiff*, 407 U.S. 493, 500 (1972); *Williams*, 399 U.S. at 100. Indeed, the preservation of that "fair possibility" is central to the integrity of the jury system because exclusion of groups "for reasons completely unrelated to the ability of members of the group to serve as jurors in a particular case . . . raise[s] at least the possibility that the composition of juries would be arbitrarily skewed in such a way as to deny criminal defendants the benefit of the common-sense judgment of the community." *Lockhart v. McCree*, 476 U.S. 162, 175 (1986).

In giving effect to the Sixth Amendment, and, more specifically, to guard against this kind of imbalance, this Court has carefully restricted those State practices—

whether intentional or not—which tend to exclude or dilute representation of diverse community groups. In *Taylor v. Louisiana*, for example, the Court invalidated the conviction of a male defendant who had been tried by a jury selected from a venire from which most women had been excluded by statute. 419 U.S. at 538. *See also Duren*, 439 U.S. at 370 (underrepresentation of women on the venire violates the Sixth Amendment fair cross-section requirement). Further, in *Ballew v. Georgia*, the Court held that the Sixth Amendment prohibits the use of a five-person petit jury in a criminal misdemeanor trial. Although there was no suggestion in *Ballew* that the venire did not represent a fair cross-section, the Court nonetheless concluded that the size of the petit jury raised an unconstitutional possibility that the jury might reach an inaccurate or biased decision, or might not truly represent the community. *Ballew*, 435 U.S. at 239.[4]

By restricting State action which eliminates or dilutes the fair possibility that the jury will truly reflect the composition of the community, the Sixth Amendment fair cross-section requirement promotes the interests of pluralism which are essential both to the integrity of our jury system and to public confidence in it. *See Taylor*, 419 U.S. at 530-31.

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[4] Although there was no majority opinion in *Ballew*, six members of the Court believed that Georgia's five-person jury violated the Sixth Amendment. *See* 435 U.S. at 239 (Blackmun, J., joined by Stevens, J.); *id.* at 245 (White, J.); *id.* at 246 (Brennan, J., joined by Stewart and Marshall, JJ.). Moreover, the three remaining members of the Court, Chief Justice Burger and Justices Powell and Rehnquist, noted that the reduced size of the jury raised "grave questions of fairness." *Id.* at 245.

B. Because The Peremptory Challenge Is A Non-Constitutional Privilege, Its Exercise Is Strictly Subject To Constitutional Limitations.

When used properly, the peremptory challenge, like the fair cross-section requirement, promotes the integrity and reliability of the jury system. It is well-established, however, that there is no constitutional right to the exercise of peremptory challenges. *Batson*, 476 U.S. at 91; *Swain*, 380 U.S. at 219; *Stilson v. United States*, 250 U.S. 583, 586 (1919). The peremptory challenge is solely a creature of legislative grace, which must be schooled in constitutional ways.

In *Swain*, the Court sought to accommodate the divergent interests embodied in the constitutional right to be free from invidious discrimination, on the one hand, and in the State's privilege of exercising peremptory challenges, on the other hand. The Court reaffirmed that the Constitution prohibits racial discrimination in jury selection, but also emphasized the wide discretion which the peremptory challenge historically has entailed. The Court therefore held that the use of peremptory challenges in any given case should be presumed proper, and not subject to judicial scrutiny. 380 U.S. at 221-22. The Court indicated, however, that discrimination in case after case would require judicial scrutiny. *Id.* at 223-24.

Experience with the *Swain* presumption showed that the balance struck in *Swain* was too one-sided, and effectively eviscerated constitutional protections. Contrary to constitutional principles, prosecutors frequently exercised their peremptory challenges to practice racial discrimination.[5] At the same time, the "crippling" burden imposed by *Swain* made it virtually impossible for criminal defendants to enforce their constitutional rights. *Batson*, 476 U.S. at 92-93.

[5] As this Court observed in *Batson*, "[t]he reality of practice, amply reflected in many state and federal court opinions, shows that the [peremptory] challenge . . . at times has been . . . used

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In *Batson*, the Court therefore reassessed the balance struck in *Swain*. In doing so, the Court stated unequivocally that the peremptory challenge may be exercised only within constitutional bounds, 476 U.S. at 89, and emphasized anew that exclusion of jurors solely because of their race is *never* constitutionally permissible, even in a single, isolated case. *Id.* at 95. The practically insurmountable presumption and burden of proof imposed by *Swain* had effectively condoned discrimination in individual cases by "largely immun[izing] [peremptory challenges] from constitutional scrutiny," *id.* at 92-93, and thus tempted prosecutors to locate an optimal level of discrimination (one which would achieve their invidious purposes without triggering judicial scrutiny).[6] Thus, the *Batson* Court adopted

[5] *continued*
to discriminate against black jurors." 476 U.S. at 99. Experience in the State of Illinois shows that the Court's observation in *Batson* may well have understated the magnitude of the problem. *See People v. Frazier*, 127 Ill. App. 3d 151, 156-57, 469 N.E.2d 594, 598-99 (1st Dist. 1984) (cataloguing 36 Illinois cases between 1980 and 1984, in which discriminatory use of peremptory challenges by prosecutor was in issue); *People v. Johnson*, 148 Ill. App. 3d 163, 179 n.2, 498 N.E.2d 816, 826-27 n.2 (1st Dist. 1986) (cataloguing 22 additional Illinois cases).

[6] In other words, the practical effect of *Swain* was not to discourage prosecutors from practicing discrimination, but to encourage them to practice discrimination with circumspection. Thus, prosecutors refrained from discriminating in "case after case," and limited their discrimination to cases where it would matter most, that is, where the prosecution's evidence was weak and the facts most susceptible to manipulations of racial prejudice. *See Commonwealth v. Martin*, 461 Pa. 289, 299, 336 A.2d 290, 295 (1975) (Nix, J., dissenting) ("[t]he glaring weakness in the *Swain* rationale is that it fails to offer any solution where the discriminatory use of peremptory challenges is made on a selected basis").

a more effective means of ensuring constitutional compliance. *Id.* at 95. In doing so, the Court firmly rejected any notion that the peremptory challenge is to be held inviolate, and confirmed that constitutional commands must take precedence over non-constitutional privileges. *See* U.S. Const. art. VI, cl. 2; *Marbury v. Madison*, 1 U.S. (1 Cranch) 267, 285-86 (1803).

C. The Prosecutorial Use Of Peremptory Challenges In A Manner That Undermines The Fair Cross-Section Requirement Violates The Sixth Amendment, And Must Therefore Be Subject To Limitation.

Unless the State may accomplish through the indirection of peremptory challenges what it cannot do directly in empaneling a venire or legislating the size of the petit jury—eliminate the fair possibility that the petit jury will reflect a fair cross-section of the community—the Sixth Amendment must be construed to impose limitations on the use of peremptory challenges. *Cf. Lane v. Wilson*, 307 U.S. 268, 275 (1939) (Frankfurter, J.) (the Constitution prohibits "sophisticated as well as simple-minded modes of discrimination"). Otherwise, the fair cross-section requirement would be a dead letter because the deployment of peremptory challenges against a particular racial group can undercut that requirement "to the same extent . . . [as if the group] had not been included on the jury list at all." *United States v. Green*, 742 F.2d 609, 611 n.* (11th Cir. 1984) (citations omitted).[7] Two courts of appeals have

[7] Indeed, this Court noted in *Swain* that peremptory challenges have been used in this country with a greater vengeance than in the United Kingdom because American jury pools are drawn from "a greater cross-section of a heterogeneous society." *Swain*, 380 U.S. at 218 (footnote omitted). In the case at bar, the Seventh Circuit went so far as to assert that the fair cross-section requirement "increases the *necessity* of employing peremptories" (J.A.

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recognized this fact and have imposed limitations, under the Sixth Amendment, to prevent peremptory challenges from being deployed as a means of abridging the fair cross-section requirement. *McCray v. Abrams*, 750 F.2d 1113, 1130-31 (2d Cir. 1984), *vacated*, 106 S. Ct. 3289 (1986);[8] *Booker v. Jabe*, 775 F.2d 762, 767-71 (6th Cir. 1985), *vacated*, 106 S. Ct. 3289, *opinion reinstated*, 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 910 (1987).[9]

If the fair cross-section requirement is to achieve its constitutional purpose, each defendant must be allowed to challenge the discriminatory use of peremptory challenges in his own case, whenever their use eliminates or substantially dilutes the participation of any particular racial group on the petit jury.[10] Consistent with this

[7] *continued*
33; emphasis added). However, any suggestion that the peremptory challenge may properly be used to subvert the fair cross-section requirement cannot stand. That requirement is both constitutionally mandated and grounded in "the very idea of a jury." *Carter v. Jury Comm'n*, 396 U.S. 320, 330 (1970).

[8] In *Roman v. Abrams*, 822 F.2d 214, 225 (2d Cir. 1987), the Second Circuit reaffirmed the continued validity of *McCray*.

[9] A number of state appellate courts have reached the same conclusion. *See People v. Wheeler*, 22 Cal. 3d 258, 276-77, 148 Cal. Rptr. 890, 903, 583 P.2d 748, 761-62 (1978); *Fields v. People*, 732 P.2d 1145, 1153-55 (Colo. 1987); *Riley v. State*, 496 A.2d 997, 1012 (Del. 1985), *cert. denied*, 106 S. Ct. 3339 (1986); *State v. Neil*, 457 So. 2d 481, 486-87 (Fla. 1984); *Commonwealth v. Soares*, 377 Mass. 461, 488, 387 N.E.2d 499, 516, *cert. denied*, 444 U.S. 881 (1979); *State v. Gilmore*, 103 N.J. 508, 526-29, 511 A.2d 1150, 1159-60 (1986) (all recognizing defendant's right, under the Sixth Amendment or equivalent state constitutional provisions, to be tried by a petit jury from which members of his race have not been excluded).

[10] It is well to remember that the Sixth and Fourteenth Amendments serve different constitutional purposes by different means. The Sixth Amendment focuses upon the composition of the venire

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Court's holding in *Duren v. Missouri*, 439 U.S. at 364, a *prima facie* violation of the fair cross-section requirement should be found when:

(1) the prosecutor, through his use of peremptory challenges, has excluded members of a distinct racial group;

(2) the representation of the group in the remaining portion of the venire from which the jury is selected is not reasonable in relation to the number of group members in the community at large; and

(3) the underrepresentation is due primarily to the prosecutor's use of peremptory challenges.[11]

[10] *continued*
and its relationship to the petit jury. Thus, under the Sixth Amendment, any defendant may challenge the underrepresentation or exclusion (whether intentional or not) of any racial group. *Duren*, 439 U.S. at 359 n.1, 368 n.26. On the other hand, the Fourteenth Amendment protects against discrimination and is concerned with the composition of the venire and its relationship to the petit jury only insofar as they provide evidence relevant to the ultimate question of discrimination. Thus, under the Fourteenth Amendment, a defendant may challenge only the intentional exclusion of members of his own racial group. *Batson*, 476 U.S. at 96. In some cases, therefore, the State's racial manipulation of the jury venire may violate the Fourteenth Amendment, but not the Sixth Amendment. In other cases, the State's actions may violate only the Sixth Amendment. Thus, the constitutional protections afforded by the Sixth and Fourteenth Amendments, respectively, are not redundant, and both must be given effect.

[11] When a Sixth Amendment challenge is directed to the facial validity of a statute, *Duren* also requires a showing of "systematic" exclusion. 439 U.S. at 364. The case at bar, of course, does not involve any facial challenge to the peremptory challenge statute, and, thus, the "systematic" prong of *Duren* has no bearing here. It is enough, as the Court observed in *Batson*, that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" 476 U.S. at 96 (citation omitted). At all events, to require something more in terms of "systematic" discrimination effectively would make the Sixth Amendment a dead letter, as *Swain* did with respect to the Equal Protection Clause. *See Batson*, 476 U.S. at 92-93.

Once a *prima facie* fair cross-section violation has been established, the prosecutor must show that a "significant state interest" was advanced by the deployment of his peremptory challenges. *Id.* at 367. The prosecutor cannot prevail, of course, merely by invoking race or group affiliation because "[a] person's race simply 'is unrelated to his fitness as a juror.'" *Batson*, 476 U.S. at 87, 97 (citation omitted). Instead, the prosecutor must support his actions by reference to some legitimate, racially neutral, non-pretextual justification. *See McCray v. Abrams*, 750 F.2d at 1132.

The deployment of peremptory challenges in a manner that subverts the fair cross-section guarantee must be subject to these reasonable limitations because the peremptory challenge, as this Court unequivocally held in *Batson*, 476 U.S. at 89, cannot take precedence over fundamental constitutional rights.

II.

RELIEF SHOULD BE GRANTED IN THIS CASE UNDER *BATSON* BECAUSE PETITIONER HAS ESTABLISHED A *PRIMA FACIE* FOURTEENTH AMENDMENT VIOLATION.

A. Given The Fundamental Nature Of The Right To The Equal Protection Of The Laws, This Court Should Give Full Retroactive Effect To *Batson*.

Almost two decades ago, Justice Harlan, in two thoughtful dissenting opinions in *Desist v. United States*, 394 U.S. 244, 256-69 (1969), and *Mackey v. United States*, 401 U.S. 667, 675-702 (1971), articulated a set of principles to govern the retroactive effect of new decisions of this Court.[12] In

[12] We recognize, of course, that Justice Harlan's analysis has not yet been fully adopted by this Court. *See Yates v. Aiken*, 108 S.

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the intervening 20 years, this Court has extensively reconsidered the law of retroactivity, and has adopted many of those principles. *See, e.g., Yates v. Aiken*, 108 S. Ct. 534, 537 (1988); *Griffith*, 107 S. Ct. at 713; *United States v. Johnson*, 457 U.S. 537, 549 (1982).

In the process of resurveying the metes and bounds of retroactivity law, this Court has not yet adopted Justice Harlan's view that newly announced constitutional rules should be applied retroactively whenever they affect fundamental rights, without regard to whether they represent a "clear break" with the past. *See Yates*, 108 S. Ct. at 537; *Griffith*, 107 S. Ct. at 716 (Powell, J., concurring). This case presents that opportunity.

In *Mackey v. United States*, Justice Harlan suggested that new constitutional rules should be made fully retroactive "for claims of nonobservance of those procedures that . . . are 'implicit in the concept of ordered liberty.' " 401 U.S. at 693 (Harlan, J., dissenting; quoting *Palko v.*

[12] *continued*

Ct. 534, 537 (1988); *Griffith*, 107 S. Ct. at 716 (Powell, J., concurring). Nonetheless, in addressing the retroactive application of *Batson*, we believe that the logical force of Justice Harlan's opinions in *Desist* and *Mackey*, and the extent to which the Court already has adopted the principles articulated there, warrant consideration of these principles at the outset.

We also recognize that in *Allen v. Hardy*, 106 S. Ct. 2878, 2880 & n.1 (1986) (per curiam), this Court summarily held, without full briefing or oral argument, that *Batson* would not be applied retroactively to those cases on collateral review which became final before *Batson* was announced, and that the Court reached that conclusion because *Batson* was a "clear break" with past precedent. More recently, however, the Court in *Griffith* discarded the "clear break" doctrine in determining the retroactive effect that *Batson* should be accorded in cases that were pending on direct appeal when *Batson* was decided. *Griffith*, 107 S. Ct. at 714. As the Fifth Circuit recently noted, this Court's decision in *Griffith* casts considerable doubt on the continued vitality of the rationale in *Allen*. *Procter v. Butler*, 831 F.2d 1251, 1254-55 n.4 (5th Cir. 1987).

Connecticut, 302 U.S. 319, 324-25 (1937) (Cardozo, J.)). Under Justice Harlan's view, retroactive application should occur whenever the new rule implicates a " 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " 302 U.S. at 325 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

The racial discrimination involved in *Batson* indisputably implicated fundamental principles of justice, because "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice," *Rose v. Mitchell*, 443 U.S. 545, 555 (1979), and is "at war with our basic concepts of a democratic society and a representative government." *Smith v. Texas*, 311 U.S. 128, 130 (1940). *See also Vasquez v. Hillery*, 474 U.S. 254, 262 (1986); *Taylor*, 419 U.S. at 527. The remedy prescribed in *Batson* is therefore informed by the most basic principles upon which our criminal justice system is founded. For that reason, *Batson* is precisely the type of case to which Justice Harlan's view would grant full retroactive effect.

Given the fundamental nature of the rights which *Batson* protects, it would be improper to deny redress to those who, solely due to the fortuities of the judicial process, completed their direct appeals before *Batson* was decided. The chronological details of petitioner's appeals bear no relation to whether he suffered the kind of discrimination which this Court condemned over 100 years ago in *Strauder*, condemned most recently in *Batson*, and, indeed, condemned in every intervening equal protection case, including *Swain*.[13] Moreover, there is no question here that

[13] The central meaning of the Equal Protection Clause is, of course, "that those who are similarly situated be similarly treated." Tussman & tenBroek, *The Equal Protection of the Laws*,

(Footnote continued on following page)

petitioner was denied his fundamental right to the equal protection of the laws.[14] Because racial discrimination is at war with our concept of ordered liberty, and nowhere more so than in the context of our criminal justice system, which is empowered to take our very lives and liberties, the rule in *Batson* must be given retroactive effect.

[13] *continued*
37 Calif. L. Rev. 341, 344 (1949). If, through the fortuities of the judicial process, a case reached this Court on direct appeal before the Court was prepared to announce the governing constitutional principle, that fact cannot provide any principled basis for distinguishing the case, or for denying to those who came first the relief which the Court has now deemed necessary to redress a fundamental constitutional violation. In fashioning a rule of retroactivity applicable to such cases, it is well to remember that "percolation" may be an indispensable part of our judicial process, but, as Justice Schaefer has aptly observed, the Court also must take care not to "ignore[ ] the impact of the law on real people." Schaefer, *Reducing Circuit Conflicts*, 69 A.B.A. J. 452, 454 (1983).

Indeed, many of the cases that reached this Court prior to *Batson*, when the Court (for its own institutional reasons) was not yet ready to expound the Constitution, may well involve factual circumstances far more susceptible to manipulation of racial prejudice than was the case in *Batson* itself. Similarly, many of them undoubtedly involve more serious penalties, such as capital punishment, where the Eighth Amendment's heightened demand for impartial fact-finding, untainted by racial prejudice or unfairness of any kind, is manifest. *See, e.g., Lowenfield v. Phelps*, 108 S. Ct. 546, 551 (1988); *Turner v. Murray*, 476 U.S. 28, 35-36 (1986); *California v. Ramos*, 463 U.S. 992, 998-99 (1983); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). One cannot reasonably assert that the vindication of a criminal defendant's right to have a jury selected without racial discrimination should be nullified by his arrival on the steps of this Court before the doors were opened.

[14] The prosecutor in this case used all of his peremptory challenges to exclude blacks, and could muster only patently pretextual explanations. *See* page 26, note 22, *infra*.

B. Because The Principles Established In *Batson* Protect And Enhance The Reliability Of Criminal Trials, They Should Be Applied Retroactively.

To preserve the integrity and reliability of the criminal justice system, this Court has given retroactive application to new rules designed to enhance the reliability of the trial. *See Ivan V. v. City of New York*, 407 U.S. 203, 204 (1972) (per curiam); *Roberts v. Russell*, 392 U.S. 293, 294-95 (1968) (per curiam). In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), for example, the Court held that the exclusion for cause of certain veniremen, merely because they voiced general reservations about the death penalty, violated the Due Process Clause. *Id.* at 522-23. In according full retroactive effect to this holding, this Court observed (*id.* at 523 n.22; citations omitted):

> [W]e think it clear . . . that the jury-selection standards employed here necessarily undermined "the very integrity of the . . . process" that decided the petitioner's fate, . . . and we have concluded that neither the reliance of law enforcement officials . . . nor the impact of a retroactive holding on the administration of justice . . . warrants a decision against the fully retroactive application of the holding we announce today.

Just as the integrity and reliability of the criminal justice process was undermined by the "stack[ing of] the deck" in *Witherspoon* (*id.* at 523), the prosecutorial use of peremptory challenges to skew the racial composition of the petit jury in *Batson* similarly jeopardized its truth-seeking function. *See Allen v. Hardy*, 106 S. Ct. 2878, 2880-81 (1986) (per curiam). Indeed, if the exclusion of blacks from petit juries were not thought to affect the jury's truth-seeking function, then prosecutors would not have abused the peremptory challenge privilege, and the

Batson decision would not have been necessary.[15] But the *Batson* decision *was* necessary, in large part to protect and enhance the reliability of the criminal trial. In this sense, *Batson* is indistinguishable from *Witherspoon* and other decisions that this Court has deemed to warrant retroactive application.[16]

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[15] Prosecutors discriminate against black veniremen for only one reason, which goes to the very heart of the judicial process: they believe that eliminating blacks from the jury panel will affect the outcome of the case and make a conviction easier to obtain, a belief which is well-founded on social science studies. *See, e.g.*, H. Kalven & H. Zeisel, *The American Jury* 196-98, 210-13 (1966); J. Rhine, *The Jury: A Reflection of the Prejudices of the Community*, in *Justice on Trial* 40, 41 (D. Douglas & P. Noble, eds. 1971); R. Simon, *The Jury and the Defense of Insanity* 111 (1967); J. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels* 33-35, 154-60 (1977); Adler, *Socioeconomic Factors Influencing Jury Verdicts*, 3 N.Y.U. Rev. L. & Soc. Change 1, 1-10 (1973); Bell, *Racism in American Courts: Cause for Black Disruption or Despair?*, 61 Calif. L. Rev. 165, 165-203 (1973); Bernard, *Interaction Between the Race of the Defendant and That of Jurors in Determining Verdicts*, 5 L. & Psych. Rev. 103, 107-08 (1979); Broeder, *The Negro in Court*, 1965 Duke L.J. 19, 19-22, 29-30; Davis & Lyles, *Black Jurors*, 30 Guild Prac. 111 (1973); Gerard & Terry, *Discrimination Against Negroes in the Administration of Criminal Law in Missouri*, 1970 Wash. U.L.Q. 415, 415-37; Ginger, *What Can Be Done to Minimize Racism in Jury Trials?*, 20 J. Pub. L. 427, 427-30 (1971); Gleason & Harris, *Race, Socio-Economic Status, and Perceived Similarity as Determinants of Judgments by Simulated Jurors*, 3 Soc. Behav. & Personality 175, 175-80 (1975); McGlynn, Megas & Benson, *Sex and Race as Factors Affecting the Attribution of Insanity in a Murder Trial*, 93 J. Psych. 93 (1976); Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. Experimental Soc. Psych. 133, 143-44 (1979); Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 St. Louis U.L.J. 662, 673-83 (1974).

[16] To the extent that prosecutors should now claim detrimental reliance, that claim sounds hollow. This Court has never condoned discrimination in jury selection, and the only change effected by *Batson* was a change in the scheme of proof to be used in establishing discrimination. Moreover, prosecutors cannot claim prejudice

(Footnote continued on following page)

C. Reliance On *Swain v. Alabama* After This Court's Denial Of Certiorari In *McCray v. New York* Was Erroneous.

Soon after this Court announced its decision in *Swain v. Alabama*, it became clear that the Court's attempt to set the balance—between the constitutional freedom from discrimination and the peremptory challenge privilege—was a failed experiment. As Justice White noted in *Batson*, prosecutorial discrimination was widespread after *Swain*. 476 U.S. at 101 (White, J., concurring). Moreover, as Justice Powell noted, the evidentiary burden that *Swain* had imposed upon criminal defendants was both "crippling," 476 U.S. at 92, and doctrinally inconsistent with less onerous evidentiary burdens developed in subsequent equal protection cases. *Id.* at 93. *See also Castaneda v. Partida*, 430 U.S. 482, 494-95 (1977); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977); *Washington v. Davis*, 426 U.S. 229, 241-42 (1976); *Alexander v. Louisiana*, 405 U.S. 625, 630-32 (1972).

Indeed, the continuing vitality of *Swain* was seriously questioned in the unprecedented opinions announced in connection with this Court's denial of certiorari in *McCray v. New York*. In their dissent from that denial of certiorari, Justices Marshall and Brennan expressed the view that the *Swain* evidentiary burden was inappropriate, 461 U.S. at 968-69, and they urged plenary review "to reexamine the standard set forth in *Swain*." *Id.* at 966. Justice Stevens, joined by Justices Blackmun and Powell, voted to deny the petition, but added (*id.* at 961-63):

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[16] *continued*
from having failed to preserve relevant information, when any such failure was based, in turn, on some tactical advantage which, under *Swain* and its progeny, prosecutors perceived to exist. This Court has never held such "[u]njustified 'reliance' [to be] . . . a bar to retroactivity." *Solem v. Stumes*, 465 U.S. 638, 646 (1984).

> My vote to deny certiorari . . . does not reflect disagreement with Justice Marshall's appraisal of the importance of the underlying issue. . . . I believe that further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date. . . . In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.[17]

Taken together, these two opinions clearly demonstrate that a majority of the Court agreed in *McCray* that the lower courts should undertake further analysis with respect to the problem of racial discrimination in jury selection, and that *Swain* should not be followed blindly. Numerous state and federal courts recognized that *Swain* had been questioned,[18] but few of them accepted the in-

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[17] In his opinion, Justice Stevens clearly invited the lower courts to reexamine the issues involved in *Swain* and its progeny, to undertake an independent analysis, and to avoid a slavish or uncritical reliance on *Swain*. That this invitation was extended to both the state courts and the lower federal courts is evidenced by Justice Stevens' observation that the absence of "conflict of decision within the federal system" counseled in favor of postponing plenary review. *See* 461 U.S. at 962. At least two federal courts so interpreted this observation. *See Simpson v. Commonwealth*, 622 F. Supp. 304, 308 (D. Mass. 1984), *rev'd*, 795 F.2d 216 (1st Cir.), *cert. denied*, 107 S. Ct. 676 (1986); *McCray v. Abrams*, 576 F. Supp. 1244, 1246 (E.D.N.Y. 1983), *aff'd in part and vacated in part*, 750 F.2d 1113 (2d Cir. 1984). Finally, Justice Stevens noted in *Batson*, 476 U.S. at 110-11 n.4, that "[t]he eventual federal habeas corpus disposition of *McCray* [*v. Abrams*], of course, proved to be one of the landmark cases that made the issues in this case ripe for review."

[18] *See Vukasovich, Inc. v. Commissioner*, 790 F.2d 1409, 1416 (9th Cir. 1986); *Bowden v. Kemp*, 793 F.2d 273, 275 n.4 (11th Cir.), *cert. denied*, 106 S. Ct. 3289 (1986); *United States v. Hawkins*, 781 F.2d 1483, 1486 (11th Cir. 1986); *Jordan v. Lippman*, 763 F.2d 1265,

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vitation to reexamine the issues involved, and virtually all continued to follow *Swain* without any critical analysis. Joining these ranks was the Seventh Circuit, which, within a year of the denial of certiorari in *McCray*, declared that *Swain* remained "controlling." *United States ex rel. Palmer v. DeRobertis*, 738 F.2d 168, 172 (7th Cir.), *cert. denied*, 469 U.S. 924 (1984). *See also United States v. Clark*, 737 F.2d 679, 682 (7th Cir. 1984).

In light of *McCray*, the mechanical reliance on *Swain* by the courts below was error. By relying on questioned authority when fundamental constitutional rights are at stake, courts distort the doctrine of *stare decisis*, and, more important, abdicate their essential obligation to uphold the Constitution (*Barnette v. West Virginia St. Bd. of Educ.*, 47 F. Supp. 251, 253 (S.D. W. Va. 1942) (3-judge court), *aff'd*, 319 U.S. 624 (1943)):

> [judges] would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has . . . impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties.[19]

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[18] *continued*

1283 (11th Cir. 1985); *Booker*, 775 F.2d at 766-67; *Prejean v. Blackburn*, 743 F.2d 1091, 1104 n.11 (5th Cir. 1984); *McCray v. Abrams*, 750 F.2d at 1116. *See also State v. Neil*, 457 So. 2d at 483-84; *State v. Gilmore*, 103 N.J. at 518, 511 A.2d at 1154-55.

[19] In constitutional cases, where erroneous decisions cannot be cured by legislation, this Court has long recognized the duty of the judiciary to " 'bow[ ] to the lessons of experience and the force of better reasoning. . . .' " *Edelman v. Jordan*, 415 U.S. 651, 671 n.14 (1974) (Rehnquist, J.; quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting)). *See also Norris v. United States*, 687 F.2d 899, 904 (7th Cir. 1982) (Posner, J.) ("to continue to follow [doubtful precedent] blindly until it is formally overruled is to apply the dead, not the living, law"); *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala.) (3-judge court)

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To correct the lower courts' misguided application of *stare decisis* in this case, this Court should hold that continued reliance on *Swain* after the denial of certiorari in *McCray* warrants reversal.[20]

III.

WHEN THE PROSECUTOR OFFERED JUSTIFICATIONS FOR HIS USE OF PEREMPTORY CHALLENGES, THE TRIAL COURT SHOULD HAVE CONSIDERED WHETHER THE JUSTIFICATIONS WERE PRETEXTUAL.

Even if this Court determines that *Batson* should not be given retroactive effect, and that the courts below properly continued to rely on *Swain* after the denial of certiorari in *McCray*, petitioner still is entitled to a hearing on his equal protection claim.[21] This is so because the

[19] *continued*
(Rives, J.) ("[w]e cannot in good conscience perform our duty as judges by blindly following the precedent of *Plessy v. Ferguson* . . . when our study leaves us [believing] . . . that the separate but equal doctrine can no longer be safely followed as a correct statement of the law"), *aff'd*, 352 U.S. 903 (1956) (per curiam).

[20] This Court's ruling in *Allen v. Hardy* has no bearing on the foregoing argument, which focuses, not on the retroactive effect that should be accorded to *Batson*, but on the precedential effect to which *Swain* was entitled after this Court denied review in *McCray*. Moreover, *Allen* is inapposite because that conviction became final before the denial of certiorari in *McCray*, and the present contention was therefore unavailable in *Allen*.

[21] The court below erred in concluding that the claim is procedurally barred (J.A. 17 n.6). At every level of the state and federal proceedings, the State responded to petitioner's claims by contending that petitioner was raising an equal protection claim controlled by *Swain* (J.A. 41 (Cudahy, J., dissenting)). Moreover, because the Illinois Appellate Court and the federal district court both rejected petitioner's claim on the ground that he had failed to demonstrate systematic exclusion under *Swain* (J.A. 41 n.2 (Cudahy, J., dissenting); J.A. 5-6), those courts specifically considered and rejected the equal protection issue on the merits. Thus, even if petitioner had not actually raised the issue at each

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prosecutor in this case chose to waive the benefit of the *Swain* presumption, and, instead, put the matter at issue by volunteering "explanations" for his peremptory challenges.

Presumptions generally are rooted in considerations such as fairness, public policy, probability, and judicial economy. *Basic Inc. v. Levinson*, 108 S. Ct. 978, 990 (1988). Specifically, the *Swain* presumption was principally grounded in the public policy concern that a prosecutor should have wide discretion in exercising his peremptory challenges in a particular case, without being forced to explain his motives. *See Swain*, 380 U.S. at 222. However, while the *Swain* presumption may have served an important purpose, presumptions cannot be applied mechanically, without regard either to their purposes or to the particular circumstances of the case. Courts "must not give undue dignity to [this] procedural tool and fail to recognize the realities of the particular situation at hand." *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1581 (Fed. Cir. 1984) (per curiam).

The "reality" here is that there was no principled reason for the courts below to have given effect to the *Swain* presumption in the particular circumstances of this case. By making a tactical decision to "explain" the reasons for his peremptory challenges (and thus, perhaps, neutralize a trial judge who had doubtless noticed that all 10 of the prosecutor's challenges had been deployed against blacks), the prosecutor himself defeated the central pur-

[21] *continued*
level in the state courts, the issue would now properly be before this Court. *See Ulster County Court v. Allen*, 442 U.S. 140, 152-54 (1979); *United States ex rel. Ross v. Franzen*, 688 F.2d 1181, 1183 (7th Cir. 1982) (en banc). *See also* J.A. 41-42 & nn.1-2 (Cudahy, J., dissenting).

pose of this presumption. At that point, the presumption should have disappeared.

Moreover, the prosecutor's explanations themselves established racial discrimination.[22] Certainly, the *Swain* presumption of propriety was not intended to preclude judicial action in the face of admitted discrimination, as Justice White, the author of *Swain*, confirmed in *Batson*. 476 U.S. at 101 n.* (White, J., concurring). *See also Tenneco Chemicals v. William T. Burnett & Co.*, 691 F.2d 658, 663 (4th Cir. 1983) (citations omitted) ("a party may not rely on a presumption when evidence from its own case is inconsistent with the facts presumed"). Similarly, the *Swain* presumption should not be read to preclude judicial scrutiny in the present case. The pretextual justifications offered by the prosecutor demonstrate racial discrimination with force equal to that of an outright admission, and therefore require judicial scrutiny.

Because there is no credible reason for giving effect to the *Swain* presumption once the prosecutor has volunteered his pretextual "reasons" for exercising his peremptory challenges, that presumption should not preclude judicial inquiry into the validity of those reasons. The Ninth Circuit made this point in *Weathersby v. Morris*, 708 F.2d 1493, 1496 (9th Cir. 1983) (citation omitted), *cert. denied*, 464 U.S. 1046 (1984):

[22] Judges Cudahy and Cummings were not the only judges to remain unmoved by the prosecutor's pretextual explanations (J.A. 48 & n.6 (Cudahy, J., dissenting)). The Illinois Appellate Court also was unimpressed by the State's justifications (*People v. Teague*, 108 Ill. App. 3d 891, 895, 908, 439 N.E.2d 1066, 1069-70, 1078 (1st Dist. 1982), *cert. denied*, 464 U.S. 867 (1983)), and, indeed, *none* of the judges who have heard this case has ever suggested that the prosecutor's explanations *are* credible.

> Cases where the prosecutor at trial volunteers his or her reasons for using peremptory challenges . . . present a situation distinguishable from *Swain*. . . . Our reading of *Swain*, convinces us that in such circumstances a court need not blind itself to the obvious and the court may review the prosecutor's motives to determine whether "the purposes of the peremptory challenge are being perverted."

In *Garrett v. Morris*, 815 F.2d 509, 511 (8th Cir.), *cert. denied*, 108 S. Ct. 233 (1987), the Eighth Circuit also concluded that the presumption must fall away in such circumstances because "the court has a duty to satisfy itself that the prosecutor's challenges were based on constitutionally permissible trial-related considerations, and that the proffered reasons are genuine ones, and not merely a pretext for discrimination."

In these limited circumstances, inquiry into the prosecutor's volunteered explanations must be permitted if courts are to avoid being made unwilling "accomplices in the willful disobedience of a Constitution they are sworn to uphold." *Elkins v. United States*, 364 U.S. 206, 223 (1960). The lower courts' mechanical invocation of the *Swain* presumption therefore warrants reversal here.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed and the cause remanded.

Respectfully submitted,

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